InsO Insolvenzordnung [German Insolvency Act]
IP intellectual property
IPO initial public offering
IPRs intellectual property rights
IRC Internal Revenue Code
IRS Internal Revenue Service
ISO International Organization for Standardization
IStR Internationales Steuerrecht
IVSC International Valuation Standards Committee
KG Kommanditgesellschaft [German limited partnership]
LOHAS lifestyle of health and sustainability
M&A mergers and acquisitions
MarkenG Markengesetz [German Trade Mark Act]
MarkenR MarkenR – Zeitschrift für deutsches, europäisches und internationales Kennzeichenrecht
MarkenV Markenverordnung [German by-law concretising the implementation of the MarkenG]
MAX Markenbildklarheits- und Attraktivitätsindex
MBA Master of Business Administration
MP3 MPEG-1 Audio Layer III or MPEG-2 Audio Layer III
NGO non-governmental organisation
NPV net present value
NZG Neue Zeitschrift für Gesellschaftsrecht
OECD Organisation for Economic Co-Operation and Development
ÖOGH Österreichischer Oberster Gerichtshof [Austrian Supreme Court]
OHIM Office of Harmonization for the Internal Market (Trade Marks and Designs)
OJ Official Journal (of the European Union)
p. page
PatG Patentgesetz [German Patents Act]
PatKostG Patentkostengesetz [German Patent Cost Act]
PC personal computer
PCT Patent Cooperation Treaty
pp. pages
q.v. quod vide (see)
R&D research and development
RFID radio frequency identification
RHM Rank Hovis McDougall
ROI return on investment
RTL Radio Télévision Luxembourg
SA société anonyme [public company established under French or Belgian law]
sec. section
sFR Swiss Francs

SigG Signaturgesetz [German Electronic Signature Act]

SIM Systematic Integrated Methodology

SMS Short Message Service

SPC supplementary protection certificate

SPV special purpose vehicle

TLT Trademark Law Treaty

TRIPs Agreement on Trade Related Aspects of Intellectual Property Rights

UK United Kingdom

UMTS Universal Mobile Telecommunications System

USA United States of America

US-GAAP United States Generally Accepted Accounting Principles

VDE Verband der Elektrotechnik Elektronik Informationstechnik e.V. [Association for Electrical, Electronic & Information Technologies]

vs. versus

WIPO World Intellectual Property Organization

WiSt Wirtschaftswissenschaftliches Studium

WM Zeitschrift für Wirtschafts- und Bankrecht

WRP Wettbewerb in Recht und Praxis

WTO World Trade Organization

ZfB Zeitschrift für Betriebswirtschaft

Chapter 1

Introduction

In today's globalised world, markets are becoming increasingly narrow due to rising competition and numbers of goods and services offered. More than ever, businesses are forced to clearly define and strengthen their competitive advantages of which brands are core drivers. There are more and more products which are so similar that differentiation can only be achieved by means other than product characteristics. Such means primarily include brands. For instance, consumers find petrol of comparable quality at most petrol stations. Hence, the major means of making the product unique and attractive to buyers is the brand. This shows why brands are decisive for most companies' success – an insight true not merely regarding business-to-consumer markets, but also with respect to business-to-business markets. It is therefore not surprising that brands constitute the most valuable assets in many modern businesses.[1]

Furthermore, there exists a range of technical inventions (which result in innovation once marketed) for which patent protection cannot be obtained or has run out. Brands are of high importance in this context in order to signal these innovations to competitors and the target audience, thus securing as much exclusivity and freedom to operate as possible. Strong brands are, for instance, of high importance for the pharmaceutical generics industry. With regard to patented inventions, strong brands are the ideal complement, enhancing patents' return on investment and strengthening the overall economic success of the business.

1 *PricewaterhouseCoopers/GfK/Sattler/Markenverband* (ed.), Praxis von Markenbewertung und Markenmanagement in deutschen Unternehmen, p. 8.

Brands are and always have been a core marketing tool. Yet today's business decision makers increasingly realise that brands and intellectual property (IP)[2] are much more than that: They are assets which can and need to be managed, traded and used as collateral.[3]

Along with this increased use of and focus on brands comes a growing demand for their valuation. Tight global competition forces businesses to maximise synergy effects by restructuring, e.g. through joint ventures, mergers or acquisitions (both horizontially and vertically), in the course of which brands are being transferred and, in consequence, given a price tag. To name a few examples which made international headlines in recent years, *Procter & Gamble* bought its competitor, shaver and battery maker *Gillette*, in 2005 for US$ 57 billion[4] and sold its hygiene paper and tissue business, comprising brands such as TEMPO, CHARMIN and BOUNTY, to competitor *Svenska Cellulosa* for € 512 million in 2007.[5] In 2004, *IBM* sold its personal computer business line to *Lenovo* for US$ 1.75 billion in order to reposition by concentrating on consulting and other services, software and the manufacturing of servers and mainframe computers.[6]

More than ever, budget pressure forces today's brand and marketing managers to make their decisions watertight. It is increasingly being realised that the valuation of brands and related IP plays a decisive role in that concern. In addition, new accounting rules like IFRS/IAS 38 require capitalisation of all acquired IP, which presupposes valuation. A number of other activities like the exploitation of brands by way of licensing cannot be adequately carried out without a value finding process.

Like all other valuation, brand valuation is a complex and interdisciplinary art. A thorough understanding of brand valuation must begin – as with respect to all other complex systems – with the fundamental framework. Such knowledge base will be provided in the first two chapters, which all

2 Unlike trade marks, brands do not belong to the group of IP but are intangible assets, cf. 2.1.1.1 and 2.1.1.2.

3 *Brückner* calls this a 'paradigm shift from intellectual property to intellectual capital', cf. *Brückner*, VPP-Rundbrief Nr. 4/2005, 149, 149.

4 http://www.faz.net/s/RubC8BA5576CDEE4A05AF8DFEC92E288D64/Doc~E4FC8E3A8F57741C899055C5B59D17CDB~ATpl~Ecommon~Scontent.html (last accessed January 28, 2008).

5 http://www.spiegel.de/wirtschaft/0,1518,471260,00.html (last accessed January 28, 2008).

6 http://www.heise.de/newsticker/meldung/54052 (last accessed January 28, 2007).

other chapters are built upon. This will equip the reader with information necessary to successfully concern himself with the theory and practice of both brand and IP valuation.

1.1 Objectives and Structure of this Thesis

1.1.1 Objectives

1.1.1.1 Structured Examination of Fundamental Valuation Issues

The importance of the extremely complex art and science of brand valuation is increasingly being recognised. Coming along with this is a soaring amount of literature from around the globe, dealing with all major aspects of brand valuation and exploitation. Keeping in mind this fact, which is reflected by the more than three hundred currently existing brand valuation methods,[7] it seems that the more one looks into the issue of brand valuation, the more questions and unresolved issues appear[8] and the more apparent the need for systematisation becomes. This is why one major objective of this work is the structured discussion of fundamental issues pertaining to valuation of intellectual property. Once the basis for a thorough understanding of value will thus be set, detailed issues relating to IP value can and will be analysed, exemplified with trade marks and brands respectively.

1.1.1.2 Improvement of Tradability of IP as Assets: Reduction of Information Asymmetries and of Risks

As will be discussed in detail in chapter three, there is a clear implementation gap, i.e. a discrepancy between the current status of considerable disaccord as to the most suitable brand valuation thinking and method(s) and the desired stage of systematic well-accepted approaches to and methods of brand valuation. The study at hand identifies and analyses that problem.[9] It intro-

7 *Amirkhizi*, "Suche nach der Weltformel". Cf. also *infra* at 3.1.1. and fn. 341.
8 One could say, along the lines of Socrates, "I know what I do not know" (*Platon*, Apology of Socrates: "Obviously I am ... a little wiser, for I do not believe to know what I do not know.").
9 A problem exists wherever there is a recognised disparity between the present and the desired state. Hence, solutions allocate all available resources in order to reduce this disparity, cf. *Michalewicz/Fogel*, Modern Heuristics, p. 1 et seq.